IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRTIT PETITION NO.287 OF 2005

Smt. Vijaya Trimbakrao Shirole ...Petitioner.

V/s

State of Maharashtra & Ors. ...Respondents.

Mr. S.M. Kelkar for the petitioner.

Mr. M.S. Mohite for respondent Nos. 2 to 8.

Mr. A.S. Shitole, APP for the State.

CORAM: V.M. KANADE, J.
DATE : 1st March, 2005

ORAL ORDER:

1. Heard the Learned Counsel for the petitioner and the learned Counsel for respondent Nos. 2 to 8 and the learned APP for the State.

2. Petitioner has filed this petition challenging the Order passed by the Sessions Judge, Pune in Sessions Case No.452 of 2002 whereby the application filed by the prosecution to examine two witnesses as additional witnesses was rejected by the Trial Court.

3. It is contended by the learned Counsel appearing on behalf of the widow of the deceased Trimbakrao Shirole that the application was preferred by the prosecution regarding statements of two witnesses and seeking permission, thereafter, to examine them as

additional witnesses. However, the said application filed by the prosecution was rejected. In para 12 of the petition, it is stated that though a request was made to the State Government to file Criminal Revision Application, the Law and Judiciary Department had taken a decision not to file revision application and, therefore, the present Criminal Writ Petition has been filed by the petitioner. It is submitted by the learned Counsel for the petitioner that since the Investigating Officer had not proceeded with the trial properly, the statements of two witnesses were not recorded and, therefore, in the interest of justice, this Court may permit the prosecution to record their statements and, thereafter, they should be called and their evidence may be recorded by the Trial Court. The learned Counsel relied on the judgment of the Apex Court in the case of Mohanlal Shamji Soni Vs. Union of India and another reported in 1991 Supp (1) SCC 271 and also in the case of Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, reported in (2004) 4 SCC 158.

4. The learned Counsel for respondent Nos. 2 to 8 submitted that the Investigating Officer having failed to take necessary steps, the prosecution should not act as a silent spectator and it was the duty of the

Court to ensure, in the interest of justice, that the permission to call the witnesses who are not examined should not be granted by the Court. The learned counsel for the accused submitted that this application is made at the fag end of the trail when the defence of the accused has already been disclosed and when the statements of these two Police Officers have not been recorded so far by the Investigating Officer. He submits that if this Petition is allowed, serious prejudice would be caused to the accused. He further submitted that this fact, as alleged in the application filed by the prosecution, was already known to the prosecution. This is evident from the statement of Dr. Shahane (P.W.25) who was examined by the prosecution on 6/11/2004. He further submitted that they had an ample opportunity during the investigation of the case to record their statements and the contents of the Station Diary were solely within the knowledge of the Investigating Officer. He has relied upon the judgment of this Court in the case of Shri R.N. Kakkar Vs. Shri Hanif Gafoor Naviwala & Others, reported in 1996(2) ALL MR 466 in which the judgment of the Supreme Court in the case of Mohanlal is relied upon and also the judgment in the case of Rameshwar Dayal Vs. State of U.P. reported in AIR 1978 SC 1558 is referred to. He submitted that two

applicants are in jail since 2001 and when the last application was rejected by this Court, a statement was made by the learned APP appearing on behalf of the State, on instructions, that the prosecution has no intention to question the correctness of the order passed by the Trial Court, rejecting the application for recall of the witnesses. He submitted that in spite of that, the present Writ Petition is filed to protract and delay the trial as the two accused are languishing in jail since 2001.

5. The learned APP appearing on behalf of the State submitted that the trial is going on for last more than 8 to 9 months. In the meantime, allegations are being made against the Investigating Officer. He submitted that it is not fair on the part of the petitioner to make an allegation against the Investigating Officer.

6. I have heard the learned Counsel for the petitioner and the accused at length so also the learned APP for the State. Without, going into the question regarding the maintainability of the Writ Petition filed by the petitioner, from the facts on record, it can be seen that the application was made on behalf of the prosecution on 26/11/2004. In the

said application, it is stated that after the evidence of Dr. Shahane (P.W.25) was recorded by the Court, his evidence revealed that accused Gautam Chikodikar has received some injuries on his person and he was examined by Dr. Shahane who was C.M.O. in Sasoon General Hospital, Pune. He has further stated in the application that the said accused had, on 6/11/2001, contacted P.I., Bund Garden Police Station and had given a false report and that this was recorded in the Station Diary of the Police Station. It is stated that these two witnesses have not been examined by the Investigating Officer in the course of the investigation. It is stated in the application that the prosecution, therefore, feels that it is necessary to examine these two witnesses as additional witnesses and, therefore, it was prayed that the prosecution may be permitted to summon these two witnesses after recording their statements and furnishing copies to the accused before they are examined in the court.

7. This application was vehemently opposed by the accused and it was stated that the facts stated in the application were already known to the prosecution and no explanation was offered for not examining these two witnesses. It is submitted that the prosecution cannot be permitted to fill up the lacuna in its case

under the garb of calling these two witnesses as additional witnesses. The Trial Court rejected the said application.

8. The law regarding summoning or recalling the witnesses by exercising power vested in Court under section 311 of the Criminal Procedure Code is quite well settled. It is no doubt true that the Court has power to summon or recall the witness in order to secure the ends of justice and in order to ensure that wherever necessary, the witnesses can be summoned or re-called as it would meet the ends of justice. However, the Supreme Court as also this Court, from time to time, has observed that the prosecution should not be allowed to recall the witnesses for the purpose of filling up any lacuna in the prosecution case.

9. In the present case, the Investigating Officer was very well aware about the two witnesses viz. the Police Officer P.I. Kale and P.I. Gore. However, he chose not to record their statements. These facts were within the knowledge of the Investigating Officer as also the prosecution during the trial which is pending since 8 to 9 months.

10. I find that there is substance in the submission

made by the learned Counsel appearing on behalf of the accused that if, at this stage, the two Police Officers are permitted to record their statements and, thereafter, they are allowed to examine as witnesses, the prosecution would get a chance to fill-up the lacuna in the case of the prosecution as defence has been disclosed by the accused during the course of the trial. The State Government also has not preferred any Revision Application against the order of the Trial Court. There cannot be any dispute regarding the ratio of the judgment in the Best Bakery's case. However, in my view, under the facts and circumstances of the case as stated hereinabove, the request made by the petitioner cannot be allowed.

11. In the result, Criminal Writ Petition is dismissed. It is clarified that the Trial Court shall decide the case in one month.

V.M. KANADE, J.